IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
v.	:	**NO. 02-385**
JAMES E. HARRIS	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **February 10, 2004**

Presently before the Court is Defendant's Motion to Vacate Sentence. On January 17, 2003, Defendant James Harris pleaded guilty to one count of failure to pay child support in violation of 18 U.S.C. § 228(a)(1), a Class B misdemeanor to which the Sentencing Guidelines do not apply.[1] See Doc. # 24; 18 U.S.C. § 3559(a)(7) (Class B misdemeanors are offenses with a maximum authorized term of imprisonment of "six months or less but more than thirty days"); 18 U.S.C. § 3581(b)(7); U.S. Sentencing Guidelines Manual § 1B1.9 (Nov. 1, 2003) (sentencing guidelines do not apply to Class B or C misdemeanor convictions or infractions). At Defendant's request, sentencing was postponed on several occasions so that he could attempt to obtain gainful employment and, ultimately, begin making child support payments. Defendant's efforts were unsuccessful. Consequently, on December 1, 2003, Defendant was sentenced to 180 days imprisonment with a recommendation to the Bureau of Prisons ("BOP") that he "be placed in a half-

[1] Because the Sentencing Guidelines do not apply, the December 13, 2002 Memorandum Opinion of the Deputy Attorney General, written by the Office of Legal Counsel, has no bearing on this case. See generally Colton v. Ashcroft, __ F. Supp. 2d __, Civ. A. No. 03-554-JBC, 2004 U.S. Dist. LEXIS 574, 2004 WL 86430 (E.D. Ky. Jan. 15, 2004) (explaining litigation surrounding this controversial memorandum).

way house so that he may participate in a work release program." Doc. # 39 at 2.

Subsequent to this judgment of sentence, counsel for Defendant discussed the Court's recommendation with the appropriate BOP staff, who informed counsel that the BOP lacks statutory authority to designate to a community confinement center a convicted person sentenced to a term of "imprisonment." In reaction to BOP's statements, on December 9, 2003, Defendant moved to vacate his sentence pursuant to Federal Rule of Criminal Procedure 35(a). The BOP later rescinded the explanation provided to counsel but still declined to place Defendant in a community confinement center because of his prisoner classification. It explained its reasoning in a January 16, 2004 letter to the Court: based on the "severity" of Defendant's offense and "his criminal history," including "multiple Assault convictions," the BOP placed Defendant in a medium security prison. Letter of 1/16/04 from D.S. Dodrill to Hon. C.M. Rufe (to be docketed per this Order). It is beyond question that the BOP is authorized to designate the place of a prisoner's imprisonment. See 18 U.S.C. § 3621(b) (granting authority to the BOP to "designate the place of the prisoner's imprisonment" based on, inter alia, "the nature and circumstances of the offense" and "the history and characteristics of the prisoner").

Under Federal Rule of Criminal Procedure 35(a), "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." The seven day period imposed by Rule 35(a) is jurisdictional; "the motion must be *ruled on* by the district court within seven days, not simply *filed with* the clerk of court during that time." United States v. Wisch, 275 F.3d 620, 626 (7th Cir. 2001); see also United States v. Lopez, 26 F.3d 512, 518-19 (5th Cir. 1994). Defendant was sentenced on December 1, 2003; excluding the intervening weekend, see Fed. R. Civ. P. 45(a)(1)-(2), the Court had until December 10, 2003 in which to

"correct" its sentence. That date having passed two months ago, the Court is without jurisdiction to grant Defendant's motion. Accordingly, the motion is denied.[2]

Even if the Court had jurisdiction, it would deny the motion on the merits. Soon after Defendant filed the motion, the Court discussed it with counsel and explained then that Defendant's sentence was devoid of any "arithmetical, technical, or other clear error." The Court welcomes this opportunity to reiterate that the term of imprisonment imposed was not contingent on Defendant's placement in a half-way house with work release. As the judgment of sentence clearly states, this was a recommendation and nothing more. See Doc. # 39 at 2 ("The Court ***recommends*** the defendant be placed in a half-way house so thathe may participate in a work release program.") (emphasis added).

The Court considered numerous important factors before imposing sentence in this case, including the need for punishment, Defendant's ability to rehabilitate himself, requisite deterrence value and Defendant's criminal history. 12/1/03 N.T. at 22-26. Especially significant was the troubling juxtaposition between Defendant's annual salary as a professional football player and his contemporaneous failure to meet his child support obligations.[3] Upon Defendant's request, recognizing Defendant's demonstrated earning potential, and in the hope of enabling Defendant to

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[2] Counsel for Defendant made no other arguments in support of his motion to vacate. The Court notes, however, that in certain circumstances a district court may modify a sentence upon motion by the BOP. See 18 U.S.C. § 3582(c)(1)(A)(i) ("the court upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent they are applicable, if it finds . . . extraordinary and compelling reasons warrant such a reduction"). No such motion is presently before the Court, and the Court expresses no opinion on the potential merit of any such motion in the case at bar.

[3] According to the presentence investigation report, which this Court adopted without objection at the sentencing hearing, 12/1/03 N.T. at 4, Defendant played professional football with various National Football League franchises from 1992 to 1999 and earned approximately $4,416,290.00.

begin making prompt payments toward the approximately $250,000 he owes in arrearage to the mothers of his children, the Court delayed sentencing on several occasions so that Defendant could try out for positions with professional football teams. Id. at 5-7, 24-25. Defendant did not obtain any such position and was only able to find a sales job paying a modest commission. Id. at 7, 25.

In view of these circumstances, the Court stated at the sentencing hearing that "this is not a probation case" because Defendant did not appear "ready to rehabilitate" himself. The Court noted a lack of assurance from Defendant that he could obtain immediate gainful employment sufficient to meet his financial obligations. Id. at 25:17-19. Accordingly, the Court imposed a sentence of imprisonment and rejected Defendant's request for immediate release. See id. at 34:21-25 ("Mr. Harris, . . . even though we just discussed at sidebar your desire to return to California to start your [sales] job tomorrow, I am denying that request and ordering you taken into custody immediately and start serving your sentence today.").

Although the Court was optimistic that Defendant might be placed in a half-way house and obtain gainful employment in order to begin to fulfill his financial obligations to his children, at no time did the Court state that this was a condition of sentence. See, e.g., id. at 29:8-9 ("However, it seems to me that the majority of his pay ***if he is allowed to work from a halfway house*** should be allocated towards the child support. . . .") (emphasis added); id. at 35:6-10 ("I am recommending that you be placed in a halfway house, and I don't see any reason why that can't be. But that depends on a number of factors, including the availability of a halfway house and the availability of a job to go along with it."). Of course, the BOP is authorized to release Defendant from his "place of imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed," including for purposes of "work at paid

employment in the community." 18 U.S.C. § 3622(c). Consistent with the Court's recommendation and in view of Defendant's restitution obligations, such limited release may be appropriate in this case. However, such a determination is vested with the BOP, not this Court. See id.

An appropriate Order follows.

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ORDER

AND NOW, this 10th day of February, 2004, upon consideration of the Motion to Vacate Sentence [Doc. # 40], and for the foregoing reasons, it is hereby **ORDERED** that the Motion is **DISMISSED**.

The Clerk of Court is hereby directed to file on the case docket the attached letter dated January 16, 2004 from D. Scott Didrill to The Honorable Cynthia M. Rufe.

It is so **ORDERED**.

BY THE COURT:

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CYNTHIA M. RUFE, J.